No. 87-879

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In the Supreme Court of the United States

OCTOBER TERM, 1987

DONALD C. ODEGARD, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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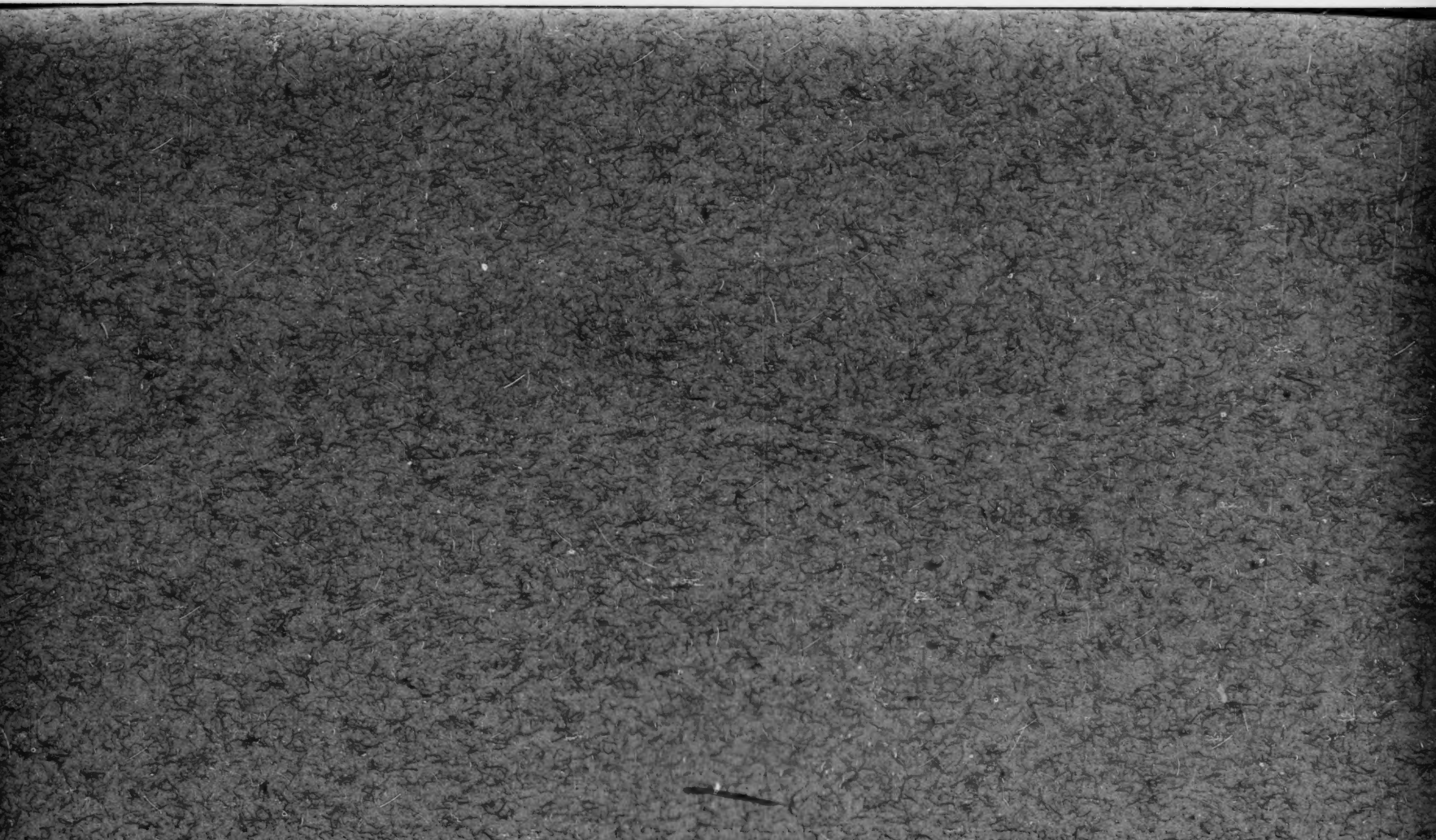

QUESTIONS PRESENTED

1. Whether the trial judge abused his discretion by excluding evidence offered by the defense concerning out-of-court experiments.

2. Whether the Air Force Court of Military Review applied the wrong standard of review in determining whether the evidence was sufficient to support petitioner's conviction.

3. Whether the trial judge's instruction on consciousness of guilt shifted the burden of proof to petitioner on an essential element of the crime.

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OPINIONS BELOW

The decision of the Court of Military Appeals (Pet. App. 1a-5a) is reported at 25 M.J. 140. The decision of the Air Force Court of Military Review (Pet. App. 6a-16a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 30, 1987. The petition for a writ of certiorari was filed on November 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial at the United States Air Force Academy in Colorado Springs, Colorado, petitioner, a cadet at the Academy, was convicted of larceny in violation of Article 121, Uniform Code of Military

Justice (UCMJ), 10 U.S.C. 921.[1] He was sentenced to confinement for two months, dismissal from the service, and total forfeiture of pay and allowances. The convening authority approved the sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 6a-16a). The Court of Military Appeals affirmed (*id.* at 1a-5a).

1. Prior to February 1984, a series of thefts of money from cadets' rooms at the Air Force Academy prompted petitioner's commanding officer, Captain Steele, to contact the Air Force Office of Special Investigations (OSI) to look into the problem (Pet. App. 7a). The investigation focused on petitioner. On Thursday, February 2, 1984, OSI Agent Doerr lightly dusted four five-dollar bills with methylene blue chloride (MBC) powder[2] and packaged them in an envelope. Doerr then arranged the envelope so that portions of the bills where exposed to view (Tr. 106-107; PX 8). The envelope containing the dusted bills was then given to Cadet Pizarrello, petitioner's roommate. Pizarrello was told not to touch the bills and to place them in his top desk drawer while petitioner was watching (Tr. 81-82, 107, 110). Pizarrello was not told that the bills had been dusted with MBC (Tr. 99, 108).

Pizarrello carried out his instructions that day, placing the money in his top desk drawer while petitioner was watching him from nearby (Tr. 82-84, 144). Between 11:45 a.m. on February 3, when Pizarrello last saw the bills in his desk drawer, and 1:30 p.m. that day, when Captain Steele

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[1] As a cadet at the Air Force Academy, petitioner was subject to court-martial jurisdiction. Art. 2(a)(2), UCMJ, 10 U.S.C. 802(a)(2).

[2] MBC is a nearly invisible powder which turns blue when it comes into contact with moisture, such as perspiration on hands. It is used to determine who has come into contact with an item that is dusted with the powder (Tr. 108).

checked the drawer, the bills disappeared (Tr. 88, 145). Captain Steele informed petitioner and Cadet Weeth later that day that the money was missing. At that time, he noticed no blue stains on petitioner's hands (Tr. 145, 149-150). That night petitioner and Pizarrello cleaned the room to prepare for an inspection (Tr. 146). A manicure inspection the next morning disclosed no blue stains on the hands of any of Captain Steele's cadets, including Pizarrello and petitioner (Tr. 146-147).

On Monday, February 6, Agents Doerr and Doughman interviewed petitioner and searched his room with his consent (Tr. 112). Petitioner denied knowing anything about the money or the theft (*ibid.*). During the search, Agent Doerr wiped petitioner's wallet with a damp tissue called a "kimwipe," and detected a light blue smear on the tissue (Tr. 114-115). Noticing no money in the wallet, Agent Doerr remarked to petitioner that petitioner must be broke. Petitioner replied that he carried his money in his pocket or his checkbook (Tr. 116). Agent Doerr then retrieved petitioner's checkbook from his desk and wiped the inside and outside of the checkbook with a kimwipe (*ibid.*). After wiping the plastic inside flap of the checkbook, Agent Doerr detected an "instant, blue smear" on the kimwipe (Tr. 116-117, 182; PX 4).[3] At that point, Agent Doughman asked petitioner to put some water on his hands "to see if any blue stains would come out"

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[3] The blue substance on that kimwipe was subsequently determined to bear the same physical and chemical properties as the MBC that was used to dust the bills (Tr. 156, 160-161). The checkbook and the wallet, when tested, disclosed no identifiable traces of MBC (Tr. 158, 245). However, the defense expert testified that wiping the checkbook could remove all traces of MBC (Tr. 261), and the prosecution expert noted that the wallet's plastic inserts contained blue stains which were visually similar to MBC, but were of insufficient quantity to permit testing (Tr. 158-159).

(Tr. 119). Agent Doerr observed that the water in the creases of petitioner's palms turned faintly blue (*ibid.*), and Agent Doughman noticed that a light blue stain appeared in a crease of petitioner's left palm (Tr. 133). Agent Doughman was certain that the stain was not a blood vein (Tr. 134). When Agent Doerr asked petitioner, "What's that?," petitioner responded, "You mean the blue stuff?" (Tr. 119, 149). Captain Steele was present during these events, and he asked petitioner if he had ever seen the money. Petitioner replied that he had not (Tr. 148).

In mid-March 1984, petitioner approached Cadet Weeth, a former roommate, and asked him what Weeth had told the OSI (Tr. 153). Later that day, petitioner again approached Weeth and asked him if he knew where the money had been placed in the room. Weeth replied that he thought it had been in Pizarrello's top desk drawer. Petitioner said that that was right, that the package of money was in the top desk drawer sitting on top of a *Playboy* magazine (Tr. 154). Petitioner then stated that he had read that *Playboy* two or three times and could have gotten "whatever dye or substance" on his hands when he read the magazine (Tr. 155). Pizarrello and others testified at trial that Pizarrello always kept the *Playboy* magazine in the bottom drawer of his desk (Tr. 89, 148-149, 154, 189).

Petitioner testified at trial and denied that he had stolen the money (Tr. 185, 201). He also denied that he was standing next to Pizarrello on February 2 when Pizarrello placed the money in his desk drawer (Tr. 172, 187, 199), and he denied seeing Pizarrello place the money in the drawer (*ibid.*). Petitioner also denied that Captain Steele had told him about the theft on the afternoon of February 3 (Tr. 175, 193), and he denied telling Agent Doerr on February 6 that he kept his money in his pocket or checkbook rather than in his wallet (Tr. 190). Petitioner

also denied saying "You mean that blue stuff?" when Agents Doerr and Doughman commented about the blue coloring on his hands after he rinsed them (Tr. 191). He also denied telling Cadet Weeth that the money had been in Pizarrello's top desk drawer or that he had taken a magazine from the top drawer (Tr. 185, 189-190). Petitioner testified that he saw only blue blood veins on his hands after rinsing them (Tr. 181, 189, 191), and he testified that he had said nothing about "the blue stuff" at that time (Tr. 149, 191).[4]

2. At trial, petitioner sought to introduce evidence concerning the results of experiments conducted by a defense expert and by petitioner's father using MBC on currency. The prosecution objected to that testimony on the ground that the conditions of the experiment were not sufficiently similar to the techniques used by the OSI to treat the stolen bills with MBC (Tr. 217; AX 7). At a hearing, the defense expert testified that he had conducted two experiments. In the first one, he placed some currency in a plastic bag that contained MBC powder in order to dust the bills (Tr. 225). He then withdrew the bills with his hands, placed them under the plastic flap of a checkbook, touched the bills, and noticed MBC contamination (*ibid.*). In the second experiment, the defense expert shook a plastic container holding a small quantity of MBC and three bills (Tr. 227). He then removed the bills, noticed that his hands showed blue coloring, and placed the unpackaged bills in the back of the checkbook, which caused the checkbook to turn a "purplish blue color" (Tr. 227-228). The defense expert acknowledged, however, that he was not aware of the method the OSI agents had used

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[4] Medical testimony at trial showed that the veins in petitioner's hands were not unusually prominent and that they ran in patterns inconsistent with the creases of his palms (Tr. 168-169).

to dust the bills or the amount of powder they had used (Tr. 229, 232). He also acknowledged that the amount of powder used would to some extent determine the amount of MBC transferred to another object (Tr. 225-226, 229), and that packaging the bills would reduce the transfer, as would folding the package or covering the bills (Tr. 233). He conceded that he was unaware of how the bills were placed in the checkbook (Tr. 236), and he agreed that the presence of a barrier between the checks and the plastic interior of a checkbook would also reduce the transfer of powder (Tr. 233).[5]

The defense also made an offer of proof concerning two experiments conducted by petitioner's father. In the first experiment, petitioner's father noticed blue coloring on his fingertips after handling money treated with MBC powder (Tr. 234-236). In the second, petitioner's father shook some bills in a plastic container holding MBC, withdrew the bills, concealed four-fifths of the bills in a package, placed them in the back of a checkbook, and obtained, in defense counsel's words, "contrary results to what the agents did" (Tr. 238).

Relying on Mil. R. Evid. 403,[6] the trial judge declined to allow the defense expert and petitioner's father to testify about their experiments. The court found that the defense had not established a sufficient similarity between the experiments and the facts of the case, and that the probative value of the evidence was greatly outweighed by the danger that it would mislead the court-martial members (Tr. 239-240).

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[5] Petitioner testified that an old identification card had been placed between the checks and the interior of the plastic cover in his checkbook (Tr. 197-198).

[6] Rule 403, Mil. R. Evid., is virtually identical to Fed. R. Evid. 403.

ARGUMENT

1. Petitioner contends (Pet. 7-10) that the trial judge erred by excluding evidence of the out-of-court experiments conducted by the defense expert and by petitioner's father.[7] A trial judge enjoys broad discretion in deciding whether to admit evidence of experimental tests after determining the degree of similarity between the conditions of the test and events in issue, and after balancing the probative value of the evidence against the risk of confusing or misleading the trier of fact. See, *e.g.*, *United States* v. *Michelena-Orovio*, 702 F.2d 496, 500, adopted on rehearing en banc, 719 F.2d 738, 740-741 (5th Cir. 1983), cert. denied, 465 U.S. 1104 (1984); *Hall* v. *General Motors Corp.*, 647 F.2d 175, 180-181 (D.C. Cir. 1980); *Collins* v. *B.F. Goodrich Co.*, 558 F.2d 908, 910-911 (8th Cir. 1977); *Renfro Hosiery Mills Co.* v. *National Cash Register Co.*, 552 F.2d 1061, 1065-1066 (4th Cir. 1977); *United States* v. *Vallejo*, 541 F.2d 1164, 1165 (5th Cir. 1976). Petitioner's claim that the trial judge abused his discretion does not warrant review by this Court.

Petitioner argues (Pet. 8-9) that the defense experiments would have shown that he could not have placed the stolen bills in his checkbook, because there would have been

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[7] Petitioner contends that the trial judge's ruling violated the Due Process Clause, but petitioner did not rely on the Due Process Clause at trial or in either the court of military review or the Court of Military Appeals. Petitioner's due process claim has made its debut in this Court, and the Court should therefore decline to consider it. See, *e.g.*, *Solorio* v. *United States*, No. 85-1581 (June 25, 1987), slip op. 15 n.18; *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984). In any event, the Due Process Clause does not add to petitioner's claim. The denial of a motion to introduce irrelevant, confusing, or misleading evidence does not violate the Constitution. *Taylor* v. *Illinois*, No. 86-5963 (Jan. 25, 1988), slip op. 9; *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

MBC powder elsewhere in his checkbook if he had done so. Petitioner's experiments, however, would have done nothing to explain the fact that MBC powder was found in his checkbook. The defense experiments would only have suggested that a greater amount of powder could have been found in the checkbook, although that difference could be due to the fact that petitioner noticed the blue coloring and attempted to clean his checkbook. The important point is that petitioner's experiments would not have provided an innocent explanation for the presence of MBC powder in his checkbook. Accordingly, those experiments were not directly exculpatory.

In any event, the trial court did not abuse its discretion by ruling that petitioner had failed to show that the out-of-court experiments were sufficiently similar to the technique used by the OSI to justify their admission. The defense expert did not know the amount of MBC the OSI had used to dust the bills, although he agreed that the amount of powder used could affect the amount of contamination (Tr. 229, 232). Moreover, because of the difference between the amount of contamination resulting from the expert's experiments and the amount of contamination in the desk drawer where the treated bills had been placed (Tr. 113, 248), it is evident that the defense experiments overestimated the amount of MBC used by the OSI to treat the bills. Furthermore, neither the expert's experiments nor the first experiment conducted by petitioner's father considered the effect of packaging the bills in an envelope, which the defense expert conceded would reduce contamination. Petitioner also did not explain how his father had packaged the bills during his second experiment. Nor did the experiments consider the effect that folding the package would have on the transfer of MBC, even though the defense expert conceded that folding would reduce the transfer of powder. In addition, the ex-

periments did not consider the effect of placing a barrier, such as the identification card used by petitioner, between the checks and the interior plastic of the checkbook. Again, the defense expert conceded that the presence of such a card would reduce the transfer of MBC from the bills to the interior of the checkbook. Under these circumstances, the trial court's decision was not an abuse of his discretion.

2. Petitioner next claims (Pet. 10-13) that the court of military review applied the wrong standard of review to determine whether the evidence was sufficient to support his conviction. The Court of Military Appeals rejected that claim (Pet. App. 4a),[8] and it does not merit review by this Court.

The standard of review applied by a court of military review to determine whether the evidence is sufficient to support the defendant's conviction is substantially different, and more generous to military defendants, than the standard employed by civilian appellate courts. A civilian appellate court does not inquire whether *it* believes that the evidence is sufficient to establish the defendant's guilt beyond a reasonable doubt, but instead only determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime

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[8] Petitioner's assertion (Pet. 12) that the Court of Military Appeals misunderstood the issue is plainly mistaken. The Court of Military Appeals determined (Pet. App. 3a-4a) that the court of military review had properly fulfilled its appellate duties by independently reviewing the evidence, considering the contentions of the parties at trial and on appeal, and expressing its satisfaction that the evidence was sufficient to prove petitioner's guilt beyond a reasonable doubt. In short, the court of military review affirmed petitioner's conviction because its own review of the case convinced it that the findings were "correct in law and fact." Art. 66(c), UCMJ, 10 U.S.C. 866(c).

beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). By contrast, a court of military review is required independently to review the record and to be convinced of the correctness of the findings before they may be affirmed. Art. 66(c), UCMJ, 10 U.S.C. 866(c).[9]

This specialized inquiry is peculiar to the military appellate courts, and the Court of Military Appeals concluded that the Air Force Court of Military Review properly carried out its responsibilities under Article 66(c) in this case.[10] At bottom, petitioner's claim amounts to a

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[9] A court of military review is required to "affirm only such findings of guilty * * * as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. 866(c). Although nothing in the language of the statute or its legislative history suggests that the courts of military review must independently apply the "beyond a reasonable doubt" standard to the record when reviewing the sufficiency of the evidence (see *Jackson* v. *Taylor*, 353 U.S. 569, 577 & n.8 (1957)), the military courts have read that standard into the statute. *E.g.*, *United States* v. *Palenius*, 2 M.J. 86, 91 n.7 (C.M.A. 1977). At the same time, that standard is tempered by another provision of Article 66(c), which admonishes the courts of military review to "recogniz[e] that the trial court saw and heard the witnesses." Accordingly, the courts of military review generally have refused to disturb the trial court's findings of guilt merely because the evidence at trial was conflicting. Instead, they have deferred to the judgments of the factfinders at trial, who were in a better position to resolve conflicts in the evidence. *E.g.*, *United States* v. *Van Steenwyk*, 21 M.J. 795, 812 (N.M.C.M.R. 1985); *United States* v. *Hudson*, 20 M.J. 607, 610 (A.F.C.M.R. 1985); *United States* v. *Landes*, 17 M.J. 1092 (A.F.C.M.R.), petition denied, 19 M.J. 22 (1984).

[10] The Court of Military Appeals has not hesitated to reverse a decision of a court of military review when it appears that the lower court failed to perform its duty under Article 66(c) to address an unresolved factual issue. See *United States* v. *Baran*, 22 M.J. 265, 267 (C.M.A. 1986).

disagreement with the findings of the court-martial panel, which were sustained by both the court of military review, under a "beyond a reasonable doubt" standard, and the Court of Military Appeals, under the traditional standard of appellate review for the sufficiency of the evidence.[11] Further review of that issue is not warranted.

3. Petitioner contends (Pet. 13-14) that the trial judge's instruction on consciousness of guilt shifted the burden of proof to the defense.

Based on petitioner's statement denying any knowledge of the stolen money and petitioner's statement to Cadet Weeth in which petitioner sought to explain the presence of MBC on his hands (Tr. 112, 148, 155), the trial judge instructed the court-martial members that they could infer from a false exculpatory statement that petitioner was aware of his guilt (Tr. 302):

> You are advised that conduct of an accused including statements made and acts done upon being informed that a crime has been committed or upon being confronted with a criminal charge may be considered by the court in the light of other evidence in the case in determining the guilt or innocence of the accused. When the accused voluntarily offers an explanation or makes some statements tending to establish his

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[11] Petitioner criticizes the court of military review for supposedly relying on a "hypothesis of guilt" standard (Pet. 11) to affirm his conviction. But petitioner has supplied no other explanation for the presence of the MBC powder inside his checkbook. In the absence of a plausible alternative explanation for that proof, the court of military review was entitled to conclude that the only reasonable explanation for the presence of the MBC powder inside petitioner's checkbook was that he stole the money. In any event, the "proof beyond a reasonable doubt" standard does not require an appellate court to rule out every hypothesis except that of guilt. *Jackson* v. *Virginia*, 443 U.S. at 362; *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954).

> innocence, and such explanation or statement is later shown to be false, the court may consider whether this circumstantial evidence points to a consciousness of guilt. It is reasonable to infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or a statement tending to establish his innocence. Whether or not evidence as to an accused's voluntary explanation or statement points to a consciousness of guilt and the significance, if any, to the attachment of any such evidence, are matters for your determination.

The instruction given by the trial judge did not expressly or implicitly shift the burden of persuasion on any element of the crime to petitioner. It merely told the trier of fact that it could consider whether petitioner made false exculpatory statements and, if so, whether they tended to show that petitioner was guilty. The instruction did not require the court-martial members to presume any fact or to draw any inference, and therefore could not have shifted the burden of proof to petitioner.[12]

Petitioner also claims (Pet. 14-15) that the instruction should not have been given because it lacked an adequate factual basis. He argues that the evidence was insufficient to justify giving the instruction because his exculpatory statements were not shown to be false. That contention also lacks merit. In light of the substantial evidence at trial directly contradicting petitioner's assertions (Tr. 82-83, 89,

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[12] Petitioner therefore errs in relying (Pet. 13-14) on decisions involving statutory presumptions or jury instructions which could reasonably be viewed as requiring the accused to bear the burden of persuasion on an essential element of the crime. *E.g.*, *Francis* v. *Franklin*, 471 U.S. 307 (1985); *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *Patterson* v. *New York*, 432 U.S. 197 (1977); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975).

148-149, 154, 189), there was sufficient evidence from which the trier of fact could reasonably conclude that petitioner's asserted lack of knowledge of the presence of the money in his roommate's desk drawer and his explanation for the presence of MBC powder on his hands were false. Thus, it was not error to instruct the court-martial members that they were free to consider petitioner's statements as evidence of his guilt. *Wilson* v. *United States*, 162 U.S. 613, 620-621 (1896) (upholding consciousness of guilt instruction where defendant's innocent explanations for his possession of the deceased's property and his denials that he had known the deceased were contradicted by evidence at trial); see also, *e.g.*, *Government of Virgin Islands* v. *Testamark*, 570 F.2d 1162, 1168 (3d Cir. 1978); *United States* v. *Wood*, 550 F.2d 435, 442-443 (9th Cir. 1976); *United States* v. *Bear Killer*, 534 F.2d 1253, 1260 (8th Cir.), cert. denied, 429 U.S. 846 (1976); see generally 2 J. Wigmore, *Evidence* §§ 273, 276 (3d ed. 1940).[13]

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[13] *United States* v. *Sanchez*, 790 F.2d 245 (2d Cir.), cert. denied, 479 U.S. 989 (1986), and *United States* v. *Grandmont*, 680 F.2d 867 (1st Cir. 1982), cited by petitioner (Pet. 14), are not to the contrary. Both cases involved consciousness of guilt instructions based on the defendant's alleged flight. *Sanchez* ruled that the defendant's unexplained absence from trial was an insufficient predicate for an instruction on flight as evidence of consciousness of guilt. 790 F.2d at 252. *Grandmont* upheld the use of such an instruction because there was sufficient evidence to justify such an inference. 680 F.2d at 869.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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